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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1376

TIMOTHY DENNIS MORIARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1967. On May 4, 1967, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including May 11, 1967, and the petition was filed on May 10. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's confession was properly admitted into evidence at trial.

2. Whether petitioner was prejudiced by the argument of government counsel.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of bank robbery. On May 6, 1966, he was sentenced to imprisonment for ten years. The court of appeals affirmed.

At trial the district court, after an evidentiary hearing outside the presence of the jury, ruled that a statement given by petitioner to two F.B.I. agents was admissible in evidence. The court expressly found that the confession was given voluntarily in the absence of threats or promises of any kind, that petitioner had been advised of his right to remain silent and his right to counsel, and that he had intelligently waived his right to counsel (Tr. 228).[1]

The F.B.I. agents testified in substance that following the robbery of a Michigan City, Indiana, bank by two men on March 19, 1965, petitioner became a suspect. On April 1, Agent Ousley visited petitioner's Pennsylvania home to inquire as to his whereabouts. The following day, petitioner's sister gave the agent the telephone number of petitioner's attorney, John J. Duffy. The agent called Mr. Duffy, who said that he was representing petitioner in a State criminal case; that petitioner was in his office at that time; and

[1] A copy of the transcript of the hearing (on motion to suppress) and the trial (cited as "Tr.") is being lodged with the Clerk of this Court. Other references ("D. App.") are to the copy of the appellant's appendix in the court below, which has been certified to this Court.

that counsel had decided, and petitioner was being instructed, that petitioner was not to talk to the agent unless the conversation took place in counsel's presence. Agent Ousley told Mr. Duffy that he was merely making inquiries and that petitioner had not been charged with a federal crime (D. App. 8-10).

On April 23, 1965, petitioner entered a plea of guilty to Pennsylvania State charges of burglary and larceny and was incarcerated in a county prison to begin serving an indeterminate sentence of from nine to twenty-three months.

On May 19, 1965, Agents Ousley and Lowe went to the Pennsylvania county prison to interview petitioner. At the outset they identified themselves and displayed their credentials. They told petitioner that they wished to talk to him but that he did not have to say anything, that anything he said could be used against him in court, and that he had the right to consult with an attorney before talking to them and the right to have an attorney present (D. App. 19–21). Petitioner said initially that he had discharged Mr. Duffy. He indicated that he had no objection to talking with them. He thereafter answered general questions as to his background and travels. When questions as to 1965 visits to Michigan City and Chicago were posed, petitioner indicated that he did not want to discuss such matters outside the presence of an attorney. The agents thereupon changed the subject (D. App. 21–22). Petitioner denied having committed the bank robbery and agreed to be fingerprinted and to appear in a line-up at a future date.

On June 14, 1965, two bank tellers and a customer who had witnessed the bank robbery appeared at the county jail with the agents for the purpose of the line-up. Petitioner refused to appear. However, as he returned to his cell from the room where he had been taken for this purpose, he was seen by the witnesses who had been stationed behind a large glass window in a room across the hall. Petitioner attempted to hide his face with his arms.[2] He thereafter asked to see the deputy warden and requested that Mr. Duffy be called. The warden sought to reach counsel but was told that he was hospitalized (D. App. 14–19; see also D. App. 69).

Two days later, on June 16, while Agent Lowe was at the county prison on another matter, he received word that petitioner wanted to talk with him in the office of the deputy warden. Lowe testified that (Tr. 108):

> I looked at Timmy was was sitting in a chair in the Deputy Warden's office and I said, "Timmy, you know who I am; you know you don't have to tell me anything; and anything you say can be used against you in a court of law, and I can't make any promises to you."
>
> At that point he told me, he said, "Well, I did it. I robbed the bank." He said, "I thought you fellows were bluffing until I saw the witnesses." And then he said he knew we were not bluffing.

Agent Lowe also testified that at this time he made no promises at all to petitioner and that petitioner

[2] The agents denied that Agent Lowe had sought to aid the viewing of petitioner by pulling on his raised arm (D. App. 18, 45; see also D. App. 98).

was told he was entitled to consult an attorney before saying anything (D. App. 41, 43). Petitioner made an oral statement which, after Agent Ousley was summoned, was reduced to writing by Agent Lowe. Petitioner signed the statement after writing a last paragraph attesting to the fact that he had read the statement and that it was true.[3]

Petitioner testified that he was never advised of his rights (D. App. 78, 87, 90–93). He admitted that he asked to see the federal agents to give the statement, but said that he had done so because the agents had offered in return a "deal" of a concurrent sentence (to run along with his State-imposed sentence) or probation. The agents had also threatened that his mother and sister might be involved in his problems. He did not believe, as he had been told, that Mr. Duffy was hospitalized. He had asked if he could have Mr. Duffy present when he gave the confession, and had been told that he could not. He had initially agreed to a line-up and subsequently changed his mind. (D. App. 78–79; 85–89).

ARGUMENT

1. Little support is contained in the record for petitioner's contention that the "totality of circum-

[3] The first paragraph of the statement recites in part:

> I have been advised that I do not have to make a statement and that anything I say can be used against me in a court of law. I have been advised of my right to consult an attorney before making a statement. I have been advised that if I cannot afford an attorney the Federal District Judge will appoint one for me. No threats or promises have been made to me.

stances" shows that his confession was coerced. The combined factors that have led this Court to conclude that a confession was involuntary have been the lack of full advice as to constitutional rights, illegal custody with prolonged interrogation specifically designed to elicit a statement, impaired faculties due to inadequate food or sleep, or isolation, and psychological pressures which, in view of the background or experience of the accused, would suggest an overbearing of his will. Cf. *Clewis* v. *Texas,* No. 648, this Term; *Spano* v. *New York,* 360 U.S. 315. Such factors are not present here either singularly or in combination.

The district court, relying as it properly could upon the testimony of the F.B.I. agents, found that petitioner repeatedly had been fully advised of his constitutional rights, including the right to counsel (and the right to have counsel present during any interrogation) (D. App. 20–21, 41–43; Tr. 65–66, 71, 123–124). Petitioner was not unsophisticated as to criminal matters. Evidence which he produced confirmed that he knew counsel did not wish him to converse with the agents outside his presence (Tr. 176), and that for this reason he refused to discuss certain matters when the federal agents first appeared at the county jail (Tr. 171). There was no overreaching by anyone during or because of petitioner's valid custody under a State conviction. The federal agents, who unequivocally denied having made promises or threats (Tr. 78; D. App. 29, 41), appeared at the county prison only once to seek an interview with petitioner, and once thereafter, one month later, to bring witnesses for a line-up to which petitioner admittedly had initially agreed.

Petitioner admitted that a few days after the first appearance of the agents, he reported this fact to counsel (Tr. 187), and that it was he who, the following month, sought out the agents for the purpose of confessing (D. App. 87). On this evidence the court properly found the confession to be voluntary.

The district court discredited petitioner's story that, on the day when he volunteered his statement, allegedly in return for a "deal", he asked for and was denied the right to have counsel present. It expressly found that petitioner intelligently waived such right (Tr. 228). Similarly, the jury obviously refused to accept petitioner's testimony as true. The case therefore is outside the scope of *Escobedo* v. *Illinois,* 378 U.S. 478, even assuming the investigation had focused on petitioner at the time he confessed. And the decision in *Miranda* v. *Arizona,* 384 U.S. 436, does not apply to the instant trial, which commenced on March 7, 1966. *Johnson* v. *New Jersey,* 384 U.S. 719.[4]

2. In his closing argument to the jury, government counsel stressed the evidence of eyewitness identifica-

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[4] Little need be said with respect to petitioner's contention that his confession was obtained in violation of the "spirit", "if not the letter" of Rule 5(a) of the Federal Rules of Criminal Procedure, which requires an officer making an arrest to bring the arrested person before a commissioner "without unnecessary delay". As the court below observed, that rule (and its effect, as explicated in *Mallory* v. *United States*, 354 U.S. 449) has no application to this case. Petitioner was not under federal arrest or in federal custody. He concedes here that there was no "illegal detention". His assertion that he was not brought before a federal judicial officer until January 17, 1966, does not support his charge that the agents "intentionally" delayed arraignment for the purpose of obtaining a confession, which was in fact volunteered by him on June 16, 1965.

tion and the written confession (Tr. 355–362). Defense counsel countered with the argument that the eyewitness testimony was not convincing and that therefore, in substance, the jury had only to consider the question of the admissibility of the confession into evidence (Tr. 363–364).[5] This produced the response, subsequently objected to, by government counsel that (Tr. 366):

> Ladies and gentlemen, Mr. Duffy would have you believe that the confession is not in evidence, but I say to you there is a confession in evidence. It is a confession voluntarily given after being fully advised of his rights. The law states if it is involuntary it is not admissible into evidence, and this statement was admitted into evidence by the Court.

Petitioner's contention that the jury could have been misled by this statement into thinking that the question of the voluntary nature of the confession was not for its consideration disregards the instructions thereafter given by the court. The court instructed (Tr. 378–379):

> Evidence has been introduced that defendant made a confession relating to the crime charged in the indictment. The jury must weigh any confession with caution, and scrutinize the cir-

[5] This impression was conveyed by the argument of defense counsel (Tr. 363, 364):

> So we are here on a clear case of considering whether or not this confession is in evidence. * * * So when you deliberate I think you should address yourselves first to the question of the admissibility of the confession. * * * We are here to litigate fundamentally the admissibility of this confession into the evidence.

> cumstances surrounding it to determine whether it was freely and voluntarily made. If the jury finds that such confession was made freely and voluntarily by the defendant with knowledge of the nature of the confession, and without fear or coercion, either physical or psychological, or promise of reward, the jury may consider it together with all the other evidence in determining the innocence or guilt of the defendant. However, if the jury finds that the confession was not made freely and voluntarily by the defendant, the jury should disregard it entirely.

Moreover, the court instructed repeatedly that the jury must follow the law as given to it by the court (Tr. 383, 384). It further said (Tr. 383–384):

> While it is the duty and the right of counsel to address you and to explain and elucidate the testimony to enable you to better understand the questions which you are to decide, yet if counsel inadvertently misstate the law or the evidence, you will follow the law as given you by the Court in these instructions, and not as stated by counsel, and you will take the evidence as detailed by the witnesses and shown by the documents introduced instead of the statements of counsel.

Thus, the jury was made fully aware of its obligation with respect to assessing the voluntariness of the confession, and cannot be assumed to have been misled by counsel's argument.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, *Jr.*,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

MAY 1967.

U. S. GOVERNMENT PRINTING OFFICE: 1967